IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Doctoroff, P.J., and Hoekstra and Markey, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

PLAINTIFF-APPELLEE,

v

PRENTICE DEVELL WATKINS,

DEFENDANT-APPELLANT.

SUPREME COURT NO. 120036

COURT OF APPEALS NO. 225572

LOWER COURT NO. 99-094247-FC

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APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

WHERE (1) DEFENDANT'S LAWYER SPECIFICALLY TOLD THE JUDGE THAT THE JUDGE COULD ASK DEFENDANT QUESTIONS AT THE DEGREE HEARING, (2) DEFENDANT TESTIFIED WITHOUT EVER INVOKING HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT, AND (3) THE EVIDENCE UNEQUIVOCALLY SHOWED THAT HE SHOT THE VICTIM IN THE BACK DURING A ROBBERY, IS HE ENTITLED TO A NEW DEGREE HEARING MERELY BECAUSE THE TRIAL COURT CALLED HIM AS A WITNESS AT THE DEGREE HEARING?

DEFENDANT-APPELLANT ANSWERS:	**YES**
PLAINTIFF-APPELLEE ANSWERS:	**NO**

COUNTERSTATEMENT OF FACTS

Plaintiff accepts defendant's Statement of Facts with the following additions.

Paragraph 5 on page 2 mentions that the trial court found defendant guilty of first degree murder. The Court of Appeals' opinion outlines the underlying facts:

> On January 18, 1998, Allen Russell Stewart was shot in the back in his mother's front yard and died the same day from his gunshot wounds. There were no eye witnesses to the shooting, although the next-door neighbor recalled seeing two men standing by a tree shortly before Allen was shot and stated that she heard the gunshot. Allen's mother Charlene Stewart also heard a loud noise at the time of shooting and observed Allen staggering into her kitchen with blood on his head. Charlene said that after Allen was shot, she was unable to locate his wallet or several pieces of jewelry that he normally wore. A police officer who responded to Charlene's 911 call noticed that Allen had duct tape on his wrists.[1] After a search of Allen's room at his mother's house, the officer found what appeared to be drug trafficking paraphernalia and 10.98 grams of crack cocaine with an estimated value of $1,000.
>
> The police subsequently received information that defendant may have been involved in the shooting. A police detective traveled to Kentucky where defendant was in jail on an unrelated charge and interviewed him after defendant waived his *Miranda* rights. According to the detective, defendant initially denied any involvement in the shooting or that he had ever been to Michigan. During a third interview, defendant allegedly admitted that he and a friend Ardell Robinson went to the neighborhood to attend a party and sat on the hood of Allen's car waiting for the party to begin. Defendant claimed that Allen pushed him and his gun went off as he slipped and fell. In a fifth interview, defendant allegedly told the detective

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[1] This duct tape had been ripped or torn apart. (12b). Stewart also had abrasions on his head, consistent with being scraped on a hard surface, like the driveway. (36b, 38b-40b). As it was, Stewart was shot in the back. (41b). The bullet entered the body in a downward direction, consistent with his being on the ground. (39b, 42b).

> that Robinson gave him a gun before they arrived in Allen's neighborhood. Defendant said that Robinson grabbed Allen, and when Allen broke away and approached defendant, he pulled his gun and it went off. The detective claimed that defendant further admitted that he and Robinson discussed robbing someone. (24a-25a). 247 Mich App 16-18.

In addition, page 2b summarizes plaintiff's evidence. (This was originally made as a trial exhibit, though it was never used at the trial level.) Pages 38b - 41b are actual exhibit copies used at the degree hearing. Each shows Stewart's injuries. Page 42b is also an admitted exhibit copy. It shows the bullet's downward trajection.

Paragraph 10 on page 2 mentions that defendant eventually filed an application for leave to appeal. Originally, he filed a claim of appeal. On April 4, 2000, the Court of Appeals *sua sponte* treated the claim of appeal as an application and granted leave to appeal. (3b).

Paragraph 11 on page 2 mentions the Court of Appeals' decision. The full citation is 247 Mich App 14; 634 NW2d 370 (2001).

Paragraph 12 on pages 2 and 3 mention this Court granting leave to appeal. The full citation is 467 Mich 868; 650 NW2d 658 (2002).

ARGUMENT

BECAUSE (1) DEFENDANT'S LAWYER SPECIFICALLY TOLD THE JUDGE THAT THE JUDGE COULD ASK DEFENDANT QUESTIONS AT THE DEGREE HEARING, (2) DEFENDANT TESTIFIED WITHOUT EVER INVOKING HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT, AND (3) THE EVIDENCE UNEQUIVOCALLY SHOWED THAT HE SHOT THE VICTIM IN THE BACK DURING A ROBBERY, HE IS NOT ENTITLED TO A NEW DEGREE HEARING MERELY BECAUSE THE TRIAL COURT CALLED HIM AS A WITNESS AT THE DEGREE HEARING.

For three reasons, defendant is not entitled to any relief. First, this issue has been waived. Two days before the trial court called defendant to testify at the degree hearing, it told him that he would ask him questions then. (7a). His lawyer responded: "I fully understand that at the degree hearing." (7a). Second, no error occurred. As a matter of Fifth Amendment law, defendant's failing to assert his Fifth Amendment rights means that his testimony has not been legally compelled. In addition, the degree hearing merely continues the plea hearing itself. By law, a defendant may be questioned about the crime at a guilty plea without his Fifth Amendment rights being violated. Third, any error was harmless anyway. Even if defendant had not testified, the evidence shows only one reasonable verdict, first degree murder. Fifth Amendment claims are not structural.[2]

WAIVER

First, this issue is waived. What happened here goes beyond both a defendant waiving his Fifth Amendment rights at a plea taking and not objecting to being

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[2]Although defendant correctly claims "de novo" as the proper review standard for most of the subissues, the correct standard, in the end, is "plain error." *People v Carines*, 460 Mich 750, 761-765; 597 NW2d 130 (1999). Defendant did not object.

called as a witness. Two days beforehand, defendant specifically told the trial court that it could do what he now complains about. The following exchange occurred at the plea taking:

> THE COURT [to defendant]: What did you say to him?
>
> MR. BRANDT [defense counsel]: Well, your Honor, I think at that point I have to stop the questioning. I think the Court has enough for the plea. We can continue this during the course of the hearing.
>
> THE COURT: Okay. We can. Of course, I'm going to ask him that then.
>
> MR. BRANDT: Absolutely. I fully understand that at the degree hearing. (7a).

Subsequently, at the degree hearing, defendant did not once object to being called as a witness. (10a).

A party telling a judge that the judge may do something waives, not merely forfeits, the issue on appeal. As this Court stated in *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001), "[w]hen a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal."

In *People v Carter*, 462 Mich 206, 215, 216, 219; 612 NW2d 144 (2000), this Court found a waiver in a situation like the present. The defendant's lawyer had specifically approved the jury instruction that he later found objectionable:

> When asked by the trial court in the present case for a response to its proposed instructions, defense counsel expressed satisfaction with the trial court's decision * * *. Because defense counsel approved the trial court's response,

> defendant has waived this issue on appeal.
>
> * * *
>
> Defense counsel in the present case did not *fail to object*. Rather, counsel *expressly approved* the trial court's response and subsequent instruction. This constitutes a waiver that *extinguishes* any error. Thus, this case does not concern unpreserved error where no timely objection was made.
>
> * * *
>
> In the present case, counsel clearly expressed satisfaction with the trial court's decision to refuse the jury's request and its subsequent instruction. This action effected a waiver. Because defendant waived as opposed to forfeited, his rights under the rule, there is no "error" to review.

Accordingly, the Court of Appeals has even said that defense counsel's merely stating "no objection" to the jury instructions also waives such an issue on appeal. *People v Lueth*, ___ Mich App ___; ___ NW2d ___ (docket no. 226717, released 11/01/02); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001), lv den 467 Mich 854; 650 NW2d 338 (2002).

In fact, the Sixth Circuit has this rule as well. In *United States v Carmichael*, 232 F3d 510 (CA 6, 2000), cert den 532 US 974; 121 S Ct 1607; 149 L Ed 2d 472 (2001), the prosecutor improperly twice spoke ex parte with the trial judge during the trial. When the prosecutor asked to do so, the defense lawyer stated, "Well, Judge, that's your call." 232 F3d 519. Then, "when the judge stated that he would see what the prosecution was referring to, defense counsel answered. 'Yes, sir.'" *Id.* The court then goes on to reject the argument:

> If ever there appears to be a case of acquiescence, this is it.

> Defense counsel only objected to the district court's acceptance of the government's ex parte representations **after the fact**, not to the ex parte discussion itself that was done under defense counsel's very nose without objection. *Id.*

Defendant's lawyer specifically said that the trial court could ask defendant questions at the degree hearing. (7a). Defendant does not even address this statement's legal significance. This Court need not even address any further issues. Defendant is not entitled to any relief at all. This issue has been waived.

NO ERROR OCCURRED

Second, in the alternative, even if this issue is somehow properly before this Court, defendant is still not entitled to any relief. No error occurred. Defendant's Fifth Amendment right against self incrimination was not violated. First, because the Fifth Amendment is not self executing, testimony is not constitutionally compelled unless the defendant asserts the privilege. Second, in Michigan, a degree hearing is part of the plea itself. Taking defendant's testimony at the degree hearing is no more untoward than taking his testimony at the plea itself, as occurs in all guilty pleas in Michigan.

First, defendant's failure to assert his Fifth Amendment right against self incrimination operates as more than just a mere waiver. Instead, as pointed out in *Garner v United States*, 424 US 648, 654; 96 S Ct 1178; 47 L Ed 2d 370 (1976), "in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." Likewise, as stated in *United States v Monia*, 317 US 424, 427; 63 S Ct 409; 87 L Ed 376 (1943):

> The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which

> may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been compelled within the meaning of the Amendment.[3]

Stated another way, the defendant's "failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself." *United States v Kordel*, 397 US 1, 10; 90 S Ct 763; 25 L Ed 2d 1 (1970). Defendant's belated Fifth Amendment assertion "is evidently an afterthought." *United States ex rel Vajtauer v Comm'r of Immigration*, 273 US 103, 113; 47 S Ct 302; 71 L Ed 560 (1927).

Minnesota v Murphy, 465 US 420, 428, 429; 104 S Ct 1136; 79 L Ed 2d 409 (1984), summarizes:

> we have never adopted the view that a witness must "put the government on notice by formally availing himself of the privilege" only when he alone is "reasonably aware of the incriminating tendency of the questions." [Citation omitted]. It has long been recognized that "[t]he Constitution does not forbid the asking of criminative questions." [Citation omitted], and nothing in our prior cases suggests that the incriminating nature of a question, by itself, excuses a timely assertion of the privilege. See, *e.g. United States v Mandujano*, 425 US 564, 574-575; 96 S Ct 1768; 48 L Ed 2d 212 (1976) (plurality opinion).
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> * * *
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> Thus, it is that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. . . . But if he

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[3]After all, the Fifth Amendment does not say that no one may be a witness against himself or that a criminal defendant (or suspect) may not be asked questions unless he first waives his rights. Instead, it says: "No person shall . . . . be *compelled* in any criminal case to be a witness against himself." (Emphasis added.)

> chooses to answer, his choice is to be considered voluntary since he was free to claim the privilege and would suffer no penalty as a result of his decision to do so.

None of the three exceptions to this rule apply. The custodial interrogation exception from *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 6 L Ed 2d 694; 10 ALR3d 974 (1966), does not apply because defendant had counsel available. *Roberts v United States*, 445 US 552, 560; 100 S Ct 1358; 63 L Ed 2d 622 (1980).[4] Second, the penalty exception from such cases as *Garrity v New Jersey*, 385 US 493; 87 S Ct 616; 17 L Ed 2d 562 (1967), does not apply because no one threatened defendant with any sanctions if he did exercise his Fifth Amendment rights. *Murphy, supra*, 465 US 434. Third, the pervasive

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[4]*Miranda* itself noted that it does not apply when the defendant has a lawyer present. 384 US 474. As stated in *Smith v Commonwealth*, 722 SW2d 892, 895 (Ky, 1987), "[t]he totality of the circumstances surrounding the second statement made it voluntary even though *Miranda* rights were not read to Smith because his attorney was present." In addition, the questioning was not in some police back room. Instead, it was in open court. In *Berkemer v Mc Carty*, 468 US 420; 104 S Ct 3138; 82 L Ed 2d 317 (1984), the Supreme Court noted that roadside questioning did not require *Miranda* warnings even though the interrogation occurred without counsel with the defendant not free to leave:

> Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.
>
> * * *
>
> Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. . . . Perhaps most importantly, the typical traffic stop is public, at least to some degree. . . .This exposure to public view reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. 468 US 437, 438.

criminal regulation of gambling activities exception from such cases as *Marchetti v United States*, 390 US 39; 88 S Ct 697; 19 L Ed 2d 906 (1968), does not apply either because defendant "ordinarily [has] no problem effectively claiming the privilege at the time disclosures are requested." *Murphy*, 465 US 440.

Therefore, defendant's claim that "when a Court orders a defendant to take the stand, in a situation where his attorney does not object, few defendants feel that they don't have to take a stand" (p 5) is not the law. The above cases state otherwise. Defendant does not even try to support this assertion.

In addition, the case that defendant relies on, *Mitchell v United States*, 526 US 313; 119 S Ct 1307; 143 L Ed 2d 424 (1999), does not apply. In *Mitchell*, the defendant actually invoked her right to remain silent, by not testifying. The trial court accordingly had no legal right to draw an adverse inference. In the present case, on the other hand, as pointed out a number of times, defendant never did invoke his right to remain silent. *Murphy*, not *Mitchell*, controls.

Second, even if defendant had asserted his right against self incrimination, it would not have applied anyway. In Michigan, a degree hearing is a continuation of the plea itself. It is neither part of the sentencing nor is it a trial. A plea, of course, waives Fifth Amendment rights for the plea taking proceeding itself.

As succinctly stated in *People v Phillip Banks*, 51 Mich App 406, 407; 213 NW2d 890 (1974), "[w]hen a defendant decides to plead guilty . . . , he conclusively waives Fifth Amendment rights for purposes of plea taking proceedings. *Boykin v Alabama*, 395 US 238; 89 S Ct 1709; 23 L Ed 2d 274 (1969)." Stated another way, "[a] guilty plea

constitutes a waiver of a number of constitutional rights . . . including the . . . right against compulsory self-incrimination." *Warren v Lewis*, 206 F Supp 2d 917, 921 (MD Tenn 2002).[5]

Since at least 1945, Michigan has required trial judges to elicit a factual basis from a defendant before accepting a plea. *People v Thomas Berry (On Remand)*, 198 Mich App 123, 126; 497 NW2d 202 (1993), lv den 443 Mich 873; 506 NW2d 873 (1993). Michigan now requires that the factual basis be under oath. MCR 6.302(A) and (D)(1).[6]

The only difference between a normal plea and the present case is that the judge must, after accepting the plea, hold a hearing to determine what the degree is: "but, if such person shall be convicted by confession, the court shall proceed by examination of witnesses to determine the degree of the crime, and shall render judgment accordingly."[7] He may even examine the defendant himself at this hearing. *People v Pearson*, 24 Mich App 270, 272; 280 NW2d 53 (1970). MCL 750.318.

The degree hearing itself, of course, is part and parcel of the plea itself. It certainly is not a sentencing. The trial court may not even sentence until after it determines what the defendant is guilty of. It is not a trial either. As this Court pointed out in *People*

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[5]A few other cases making this obvious point include *Bishop v State*, 812 So 2d 934, 945 (Miss 2002), cert den __ US __; 123 S Ct 468; 154 L Ed 2d 335 (2002); *People v Schneider*, 25 P3d 755, 759 (Colo 2001), and *State v Schafer*, 969 SW2d 719, 731 (Mo 1998), cert den 525 US 969; 119 S Ct 419; 142 L Ed 2d 340 (1998).

[6]The federal rules also require a factual basis. FRCrim P11(f).

[7]This requirement is mandatory. If no witnesses are called, the plea is void. *People v Machus*, 321 Mich 353; 32 NW2d 480 (1948); *People v Martin*, 316 Mich 669; 26 NW2d 558 (1947).

v Roberts, 211 Mich 187, 193-194; 178 NW 690; 13 ALR 1253 (1920), "[t]here was nothing else to do but apply the statute and classify the crime." In fact, the Court of Appeals in the present case quite correctly pointed out that no trial occurred:

> Under MCL 750.318, the trial court then conducted an "examination" of witnesses to determine the degree of murder. This examination did not constitute a trial. See *People v Case*, 7 Mich App 217, 225; 151 NW2d 375 (1967). (3b).

Therefore, no Fifth Amendment violation occurred. The degree hearing (though unique) is part and parcel of the plea itself. In fact, extra testimony to supplement the plea is not even unique to an open murder plea. In some situations, Michigan allows extra evidence to supplement a guilty plea. *People v Martínez,* 123 Mich App 145, 148-149; 333 NW2d 199 (1983), lv den 417 Mich 1100.7 (1983).[8]

Therefore, defendant's argument that Fifth Amendment applies to the degree hearing because, like a sentencing, they "both involve fact finding, during which witnesses must be called, and the exposure of the defendant to different degrees of sanction by the State must be determined" (pp 7-8) would apply to every guilty plea in Michigan. As

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[8]In fact, the guilty plea statute itself allows for such a procedure:

> Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied *after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea,* that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed. (Emphasis added.) MCL 768.35.

pointed out above, every guilty plea requires the judge to put the defendant under oath and then elicit a factual basis from him. If what happened at the degree hearing violates the Fifth Amendment, then the Fifth Amendment is violated in every Michigan guilty plea.

In fact, what is the difference? If in fact the trial court cannot call defendant as a witness at the degree hearing, then he will just elicit a more detailed factual basis at the earlier plea hearing. As pointed out above, of course, such questioning does not violate the Fifth Amendment. How are defendant's rights then vindicated if the questions are merely asked two days earlier?

Accordingly, the cases that defendant relies on do not apply. As pointed out above, *Mitchell, supra*, involved a sentencing hearing. It did not by any means involve anything that could conceivably be considered a part of the plea itself. In fact, *Mitchell* itself distinguished a sentencing from a court ensuring a factual basis:

> Of course, a court may discharge its duty of insuring a factual basis for a plea by "questioning the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded." FRCrim P11(c)(5). We do not question the authority of a district court to make whatever inquiry it deems necessary in its sound discretion to assure itself the defendant is not being pressured to offer a plea for which there is no factual basis. 526 US 324.

Likewise, *Estelle v Smith*, 451 US 454; 101 S Ct 1866; 68 L Ed 2d 359 (1981), does not apply either. Like *Mitchell*, *Estelle* dealt with a sentencing consideration. *Estelle*'s statement that the Fifth Amendment does not turn on the proceeding but on nature of the statement, 451 US 462, does not apply to pleas. As pointed out above, and as acknowledged in *Mitchell,* a judge accepting a plea has the right to determine just what

the defendant is guilty of. By pleading guilty, the defendant waives his Fifth Amendment rights. The degree hearing is merely finding out just what the defendant is guilty of. It is no more part of a sentence or a trial than any other plea hearing ever is.

Last, *People v Manser*, 172 Mich App 485; 432 NW2d 348 (1988), does not apply either. *Manser* dealt with a probation violation hearing, once again a sentencing.

HARMLESS ERROR

Third, also in the alternative, any error was harmless.[9] After all, defendant admits that he shot Allen Stewart. Stewart was not only beaten in the face, but his wrists were bound with duct tape. Defendant's stories (2b), on the other hand, made no sense at all. They did not in the least explain duct tape, facial injuries (38b-41b), or why the bullet entered Stewart's back and left through his thigh (42b).

In fact, defendant's testimony was really no different than the last of his five stories (2b). Because the judge already had a confession saying the same thing, no plain error occurred. In fact, even if the issue were properly preserved for appeal, for the same reason, any error was harmless beyond a reasonable doubt. *Boles v Foltz*, 816 F2d 1132, 1135-1136 (CA 6, 1987), cert den 484 US 857; 108 S Ct 167; 98 L Ed 2d 121 (1987).

As it is, defendant does not even argue that the Court of Appeals was wrong on this point. Instead, he argues exclusively that any error here is per se reversible error, *i.e.,* structural error.

As this Court has stated a number of times, automatic reversal rules are

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[9]Actually, as the Court of Appeals correctly pointed out, the plain error standard applies. (28a-30a). 247 Mich App 25-30.

disfavored. *People v Graves*, 458 Mich 476, 481; 581 NW2d 229 (1998); *People v Belanger*, 454 Mich 571, 667; 563 NW2d 665 (1997); *People v Mc Cline*, 442 Mich 127, 134, n 10; 499 NW2d 341 (1993); *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992).[10]

Just because the Fifth Amendment may have been violated does not therefore necessarily mean that the "criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocense." *Rose v Clark*, 478 US 570, 578; 106 S Ct 3101; 92 L Ed 2d 460 (1986). *Arizona v Fulminante*, 499 US 279; 111 S Ct 1246; 113 L Ed 2d 302 (1991), itself dealt with a Fifth Amendment claim, an involuntary confession. It specifically said that such an issue is subject to harmless error analysis, it is the type that may "be quantitatively assessed in the context of other evidence presented." 499 US 308. Defendant does not even try to distinguish coerced testimony from a coerced confession.

The Court of Appeals correctly analyzed this point:

> Defendant's compelled testimony and the impact of that testimony on the trial was an error in the presentation of one particular portion of the case, not a defect in the entire framework of the case. In addition, unlike clear structural errors such as deprivation of counsel or bias of the court, this error was easily quantifiable. The error began when the court called the defendant to the witness stand and ended when defendant concluded his testimony. Were we to simply extract the erroneous testimony from the degree hearing, an examination of the remainder of the proceeding would expose no fundamental unfairness in the conduct of the case. It is

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[10]The Sixth Circuit itself has said that there is only "a limited set of structural rights whose violation constitutes per se error." *United States v Riddle*, 249 F3d 529, 535 (6th Cir. 2001), cert den 534 US 930; 122 S Ct 292; 151 L Ed 2d 216 (2001). In *Riddle*, the court declined to add the defendant being absent from voir dire to this "limited" list.

> apparent that the trial court's erroneous decision to compel defendant to testify against himself was a structural error. (29a). 247 Mich App 28.

Defendant does not even address this point.

As it is, the Court of Appeals' opinion is not the only opinion finding harmless error. In Ex parte Bowers, 886 SW2d 346, 351 (Tex App 1994), over objection, the defendant had been called to testify at his criminal contempt hearing. Although the en banc Texas Court of Appeals found error, it found it to be harmless because the defendant had testified to so little. Although the majority did not use the "structural" analysis, a dissent did. 886 SW2d 356.

Therefore, defendant is not entitled to any relief. This Court's four questions may be answered as follows.

(1) Was defendant's testimony at the degree hearing compelled? No, not in the Fifth Amendment sense.

(2) Was the degree hearing pursuant to MCL 750.318 a continuation of the plea hearing under MCR 6.302? Yes.

(3) Did defendant's guilty plea waive his Fifth Amendment right against compelled self-incrimination for purposes of the degree hearing? Yes, especially in this case.

(4) Was the alleged error in compelling defendant to testify a structural error? No.

RELIEF

ACCORDINGLY, plaintiff asks this Court to affirm.

Respectfully submitted,

February 10, 2003

JERROLD SCHROTENBOER (P33223)
CHIEF APPELLATE ATTORNEY

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Margaret Smoot states that on the 10th day of February, 2003, she served 2 copies of **APPELLEE'S BRIEF** and **APPELLEE'S APPENDIX** upon:

DONALD R. COOK
ATTORNEY FOR DEFENDANT-APPELLANT

at the above address by First Class Mail with postage fully prepaid.

Margaret Smoot
Legal Secretary

watkinsPbrsct